Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies	)	WT Docket No. 13-238
	)	
Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting	)	WC Docket No. 11-59
	)	
Amendment of Parts 1 and 17 of the Commission's Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications for Certain Temporary Towers	)	RM-11688 (terminated)
	)	
2012 Biennial Review of Telecommunications Regulations	)	WT Docket No. 13-32

To: The Commission

REPLY COMMENTS OF PCIA – THE WIRELESS INFRASTRUCTURE ASSOCIATION AND THE HETNET FORUM

Jonathan M. Campbell
Director, Government Affairs

D. Zachary Champ
Government Affairs Counsel

D. Van Fleet Bloys
Government Affairs Counsel

PCIA – The Wireless Infrastructure Association
500 Montgomery Street, Suite 500
Alexandria, VA 22314

March 5, 2014

EXECUTIVE SUMMARY

As the record demonstrates, the FCC should act expeditiously to remove barriers to wireless infrastructure deployment and in so doing facilitate investment in mobile broadband. Rapid network infrastructure deployment will benefit all Americans, fostering economic growth, bolstering public safety, and driving innovation. It is therefore critical that the FCC use the current proceeding to streamline the deployment of wireless infrastructure so that America's wireless networks remain the leading platform for innovation and economic growth.

First, the record reflects diverse support for streamlining the environmental and historic preservation review process for DAS and small cell installations. Commenters recognize that distributed antenna systems ("DAS") and small cells are technologies that, at most, lightly touch the environment while reducing the need for new towers, and therefore streamlined review is appropriate. The record, however, demonstrates that the FCC's current environmental and historic preservation review procedures needlessly delay the deployment of these technologies. As such, commenters strongly support a categorical exclusion from the Commission's National Environmental Policy Act ("NEPA") review of DAS and small cell facilities that meet a technology neutral, volume-based definition. To maintain future regulatory flexibility, the FCC should develop an accelerated waiver process for facilities that conform to the intention of the exclusion but do not fit within the stated dimensions. Further, the FCC should clarify that the Section 1.1306 Note 1 collocation exclusion applies to collocations on existing structures besides buildings and antenna towers, such as utility poles and water towers.

A diverse group of commenters also express support for streamlining the historic preservation review of DAS and small cells under the National Historic Preservation Act ("NHPA"). Wireless providers, equipment manufacturers, railroad representatives, and utility groups all agree that a categorical exclusion from NHPA-based review is warranted for DAS and

small cells given their non-existent or at most minimal impact on historic resources. If a streamlined approach to the FCC's procedures is not enacted, the promise of a highly-targeted, low cost, and flexible technology will be lost to unnecessary delays and disproportionate costs.

The record broadly supports the FCC excluding from NHPA review utility poles over 45 years old. Moreover, the FCC should exclude from NHPA review collocations on buildings and other non-tower structures regardless of age if (1) the antennas added are in the same location as previously deployed antennas; (2) the height of new antennas does not exceed the height of the existing antennas by more than three feet or the new antennas are not visible from the ground; and (3) the new antennas comply with any requirements placed on the existing antennas by the state or local zoning authority or as a result of the prior historic preservation review process.

Second, the record demonstrates the need for FCC action to interpret and enforce Section 6409(a). Commenters agree that the FCC has broad authority to adopt rules that clarify and enforce Section 6409(a) of the Spectrum Act. The record supports FCC action to define key statutory terms and specify application procedures, timelines, and remedies, which will in turn promote predictability, remove uncertainty, and avoid unnecessary litigation over the meaning of undefined terms. Specifically, commenters recognize: that the "may not deny, and shall approve" mandate in Section 6409(a) requires jurisdictions to approve all Eligible Facilities Requests ("EFRs")—requests covered by Section 6409(a)'s narrow scope of review—without exception and without discretionary review, but may require compliance with building codes; that the definition of "substantially change the physical dimensions" should generally parallel the four-part test in the Collocation Agreement; that an EFR application may only require the information needed to confirm that the request is covered under Section 6409(a); that EFR requests shall be approved in 45 days; that moratoria do not apply to EFRs; and that Section 6409(a) applies to

municipalities acting as land use regulators, but not to municipalities acting in their capacity as property owners.

Further, the record demonstrates the need for an automatically triggered "deemed granted rule" for those EFRs that are not timely approved or denied in accordance with Section 6409(a). A deemed granted rule would prevent undue delay, and the FCC is fully within its authority to adopt such a remedy to speed deployment.

Third, commenters support taking further steps to interpret Section 332(c)(7) and clarify the Shot Clock. The record demonstrates that the FCC should take steps to clarify the operation of the Shot Clock, including defining terms and specifying application procedures. Specifically, the FCC should: modify the collocation Shot Clock to require action within 45 days; apply the same test for "substantial increase in size" in the same manner it interprets the like test for Section 6409(a); clarify that the Shot Clock runs regardless of moratoria; specify standards by which an application is determined complete for purposes of triggering the shot clock; apply the Shot Clock to DAS and small cell installations; and declare that municipal property preferences are unreasonably discriminatory.

Consistent with the deemed granted remedy compelled by Section 6409(a) for EFRs, the record also supports adoption of a deemed granted remedy that applies to all facilities—including new tower requests.

Finally, commenters generally agree that the temporary tower waiver should be made permanent. Commenters addressing the temporary tower issue agree that the FCC should make permanent its waiver exception from the public notice requirements set forth in Section 17.4(c)(3)-(4). The record demonstrates that temporary towers are minimally impactful on the environment and can ensure the availability of broadband coverage and capacity during major events and other brief periods of localized high demand. Consistent with the weight of the

record, the FCC should create a permanent exemption for temporary towers meeting the measured criteria of the Commission's waiver.

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies	)	WT Docket No. 13-238
	)	
Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting	)	WC Docket No. 11-59
	)	
Amendment of Parts 1 and 17 of the Commission's Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications for Certain Temporary Towers	)	RM-11688 (terminated)
	)	
2012 Biennial Review of Telecommunications Regulations	)	WT Docket No. 13-32

REPLY COMMENTS OF PCIA – THE WIRELESS INFRASTRUCTURE ASSOCIATION AND THE HETNET FORUM

PCIA – The Wireless Infrastructure Association and the HetNet Forum ("PCIA") respectfully submit these reply comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") considering adoption of measures to further accelerate broadband deployment by improving wireless facility siting policies.[1] The record supports swift action to streamline the environmental and historic preservation review of distributed antenna systems ("DAS") and small cell facilities, implement and enforce Section 6409(a) of the Middle Class

[1] *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Notice of Proposed Rulemaking, 28 FCC Rcd 14238 (2013) ("NPRM").

Tax Relief and Job Creation Act of 2012,[2] clarify the Shot Clock, and make permanent the FCC's environmental notification exemption for temporary towers.

DISCUSSION

Wireless siting reform is needed now. Unnecessary environmental reviews are delaying the use of beneficial DAS and small cell technologies that can increase capacity and/or provide coverage solutions that traditional macrocell sites cannot—all with minimal, if any, adverse effects. Divergent views over how to interpret Section 6409(a)'s statutory terms are similarly impeding the statute's streamlining goals, undermining the consistency and predictability infrastructure providers need to quickly deploy critical broadband networks. The FCC can facilitate greater coverage and capacity of wireless broadband networks by removing barriers to the deployment of DAS and small cells, and refining the rules for collocations and other modifications. Taking these and other steps discussed herein will further accelerate broadband deployment for the benefit of all Americans.

I. THE RECORD REFLECTS THE NEED FOR SWIFT ACTION TO STREAMLINE DAS/SMALL CELL ENVIRONMENTAL REVIEW.

The record reflects diverse support for streamlining the environmental and historic preservation review process for DAS and small cell installations.[3] Commenters recognize that

---

[2] Middle Class Tax Relief and Job Creation Act of 2012, 112 Pub. L. 96, Title VI, 126 Stat. 156, 232, § 6409(a) (2012) ("Spectrum Act"), *codified at* 47 U.S.C. § 1455(a).

[3] *See* Comments of the Association of American Railroads ("Ass'n of American Railroads") at 5-8; Comments of AT&T Inc. ("AT&T") at 2-6, 10-18; Comments of Crown Castle ("Crown Castle") at 3-9; Comments of CTIA – The Wireless Association® ("CTIA") at 21-22; Comments of ExteNet Systems, Inc. ("ExteNet") at 4; Comments of Joint Venture: Silicon Valley ("Joint Venture: Silicon Valley") at 4-5; Comments of PCIA – The Wireless Infrastructure Association and the HetNet Forum ("PCIA") at 6-23; Comments of QUALCOMM Incorporated ("Qualcomm") at 3; Comments of Sprint Corporation ("Sprint") at 3-6; Comments of the Telecommunications Industry Association ("TIA") at 3-4; Comments of Towerstream Corporation ("Towerstream") at 29-33; Comments of the Utilities Telecom Council ("UTC") at

(continued on next page)

DAS and small cells are minimally impactful technologies that, at most, lightly touch the environment while reducing the need for new towers, and therefore streamlined review is appropriate.[4] As one commenter notes, "the deployment of these small wireless facilities is unlikely to significantly impact the environment or have more than a *de minimis* effect on historic properties, as they use a limited footprint, do not have a significant visual impact on the surrounding area, and require less soil penetration than traditional communications towers."[5]

Nevertheless, as discussed below, the record shows that current review procedures are needlessly delaying beneficial broadband deployment. Accordingly, the record supports a new categorical exclusion for DAS and small cells, as proposed by PCIA, as well as more targeted relief from both National Environmental Policy Act ("NEPA") and National Historic Preservation Act ("NHPA") review. The FCC should move quickly to adopt these proposals so that more consumers may benefit from the broadband capacity and coverage enhancements and economic advantages these technologies can provide when unnecessary regulatory barriers to their deployment are removed.

(footnote continued)
3-9; Comments of the Wireless Internet Service Providers Ass'n ("WISPA") at 12-20; Comments of Verizon and Verizon Wireless ("Verizon") at 8-25; *see also* Comments of the District of Columbia ("D.C.") at 25; Comments of Ohio Historic Preservation Office ("Ohio") at 2; Comments of the Planning Board of the Borough of Mendham, Morris County, New Jersey ("Mendham Borough, NJ") at 4.

[4] *See* Ass'n of American Railroads at 5-8; AT&T at 3-4, 11-12; Crown Castle at 3, 7-8; CTIA at 22; PCIA at 6-7, 11-15; Sprint at 5; TIA at 3; UTC at 8-9; WISPA at 13, 15; Verizon at 11, 15-16.

[5] Ass'n of American Railroads at 7-8.

A. Current Review Procedures Needlessly Delay Deployment of Beneficial Broadband Facilities.

The record demonstrates that the FCC's environmental and historic preservation review procedures are needlessly delaying the deployment of DAS and small cells.[6] For example, Verizon explains that current requirements "still subject[] these new deployments to most of the same requirements and waiting periods that were developed years ago for new macrocell sites, delaying new deployments," and this regime is creating an acute problem "given the literally tens of thousands of such cells carriers must deploy to meet exploding broadband capacity needs."[7] Verizon notes that the NHPA review process is particularly problematic, taking on average 84 days to complete.[8] AT&T similarly points out that NHPA review of DAS and small cell deployments is counter-productive because it "discourage[s] deployments in urban areas, which have a higher concentration of older structures, historic properties, and historic districts – areas where DAS and small cell deployments are often the most needed."[9]

While NHPA review procedures are especially ill-suited to DAS and small cell deployments, the record shows that the FCC's NEPA rules can also impede deployment of these advanced technologies. For example, the FCC's rules arguably require the preparation of an environmental assessment for a new pole that will support a DAS or small cell node if that pole is located in a 100-year floodplain, even if the pole is located in a previously disturbed right-of-

[6] *See, e.g.*, Ass'n of American Railroads at 3, 12; AT&T at 5, 12; Joint Venture: Silicon Valley at 4; Verizon at 3-4, 8-9, 17-18.

[7] Verizon at 3.

[8] *Id*. at 9.

[9] AT&T at 5.

way and the same pole would not require environmental review if installed for another public utility purpose.[10] As Crown Castle explains, this can lead to absurd results:

> Practically speaking, much of the area along the Gulf Coast and other coastal regions fall within 100-year flood plains. In rural areas with little or no existing coverage, this may result in [the need for] hundreds of new utility poles, each with an individual environmental assessment for construction in the right-of-way.[11]

The need for reform is also highlighted by the railroad industry, which needs to deploy thousands of poles to meet a December 2015 congressional deadline for Positive Train Control deployment. As the Association of American Railroads notes: "Like other licensees, railroads are encountering challenging delays and incurring significant costs as they attempt to comply with the Commission's environmental and historic preservation processing rules. These delays jeopardize the railroads' ability to continue operations and satisfy Congressionally mandated public safety deployment requirements."[12]

Ultimately, because DAS and small cell deployments typically require larger numbers of facilities to provide coverage comparable to that of a single macrocell, the environmental compliance costs for DAS and small cells are particularly magnified when unnecessary obligations are imposed[13]—even though, as Sprint notes, "in most cases, there is no environmental or historic preservation impact or the impact is *de minimis*."[14] These time and cost

---

[10] *See* 47 C.F.R. § 1.1307(a)(6).

[11] Crown Castle at 3-4.

[12] Ass'n of American Railroads at 12; *see also id*. at 8.

[13] *See* NPRM ¶ 35.

[14] Sprint at 6; *see also* Ass'n of American Railroads at 8 ("The financial and regulatory costs involved in environmental and Section 106 processing far outweigh any minimal danger of environmental effects that would stem from expanding the current exclusions to include small wireless facilities. The current uncertain regulatory landscape slows the pace of wireless deployment and needlessly wastes the time and money of all stakeholders, without providing any benefit to the resources such regulations are intended to protect.").

constraints impede broadband deployment.[15] As discussed below, PCIA agrees that where, as here, "less environmental risks exist, less environmental review should be required."[16]

B. The FCC Should Exercise Its Authority to Adopt a NEPA-Based Exclusion for DAS and Small Cell Installations, Along with Other Targeted Relief.

Commenters strongly support streamlining the Commission's NEPA review of DAS and small cell facilities.[17] In particular, commenters support PCIA's proposal to categorically exclude DAS and small cell installations meeting a technology neutral, volume-based definition that ensures only minimally impactful installations are excluded from environmental review.[18] Specifically, the FCC should categorically exclude those deployments meeting the definition of "Communications Facility Installations," which specifies the maximum cubic volume of relevant facilities that should be excluded.[19]

Commenters suggest several helpful adjustments and clarifications to PCIA's proposed criteria for excluding Communications Facility Installations. For example, Crown Castle recommends that PCIA's proposed volume limitation for antennas be increased from three to

---

[15] *See* AT&T at 3 ("[B]ecause DAS and small cell systems are typically deployed as dozens, if not hundreds, of small antennas, applying needless requirements to those technologies are much more burdensome than applying them to macro sites that would serve the same area. The result would be fewer (or certainly less extensive) DAS and small cell projects, depriving the public of beneficial (and often necessary) advanced broadband services.").

[16] AT&T at 11.

[17] *See* Ass'n of American Railroads at 5, 8-12; AT&T at 2, 10, 14-17; Crown Castle at 5; CTIA at 22; ExteNet at 4; PCIA at 6-15; Qualcomm at 3; Sprint at 3-4, 6; TIA at 3; Towerstream at 29-31; UTC at 3-7; WISPA at 12.

[18] *See* Ass'n of American Railroads at 9-10; AT&T at 14-17; Crown Castle at 5; ExteNet at 4; Sprint at 3-4, 6; TIA at 3-4; Towerstream at 30; UTC at 6; WISPA at 15-16; Verizon at 10 & n.17.

[19] *See* PCIA at 7-9.

five cubic feet to account for situations where more than one carrier "will be collocated."[20] Expanding the exclusion to encompass a slightly larger but still physically unobtrusive antenna volume can encourage the beneficial use of a single antenna node to accommodate multiple carriers, which can lessen any overall effects. "[O]ne larger antenna deployed in a single node location may have less overall impact than multiple carrier or multiple technology installations installed in close proximity to one another."[21]

In a similarly constructive vein, AT&T proposes to include "modestly-sized antennas and related equipment that can be used for microwave backhaul," such as those deployed using millimeter wave spectrum, within the definition of Communications Facility Installations.[22] As AT&T notes, microwave in some cases "is the only feasible backhaul solution . . . and, without it, the DAS or small cell facility could not provide commercial service."[23] Requiring environmental review of microwave antennas and equipment in these instances "would stall broadband deployment even if the underlying DAS or small cell equipment is exempt and limit the benefits of the DAS and small cell exemption, while conferring little public interest benefit."[24]

Notwithstanding industry efforts to carefully calibrate the antenna and equipment volume measurements for purposes of the Communications Facility Installations exclusion, unanticipated developments in DAS and small cell technology may require future regulatory flexibility.

---

[20] Crown Castle at 5-6. WISPA, which represents the fast-growing wireless Internet service provider industry, proposes a slightly larger antenna volume of six cubic feet. As it explains, "[a] six-foot antenna volume would include most wireless broadband devices . . . while still remaining physically unobtrusive." *See* WISPA at iv, 15-16.

[21] Crown Castle at 6.

[22] AT&T at 15.

[23] *Id*.

[24] *Id*. at 16.

Therefore, the FCC should also develop an accelerated waiver process for facilities that conform to the intention of the exclusion but do not fit within the stated dimensions.[25]

Commenters also support clarifying that the Section 1.1306 Note 1 collocation exclusion applies to collocations on existing structures besides buildings and antenna towers.[26] As these commenters explain, collocations on other existing structures, such as utility poles, water tanks, light poles, and billboards, are no more likely to significantly affect the environment than collocations on antenna towers and buildings.[27] Indeed, collocation on existing structures regardless of type can be environmentally preferable to the construction of new towers and should be encouraged.[28]

Commenters do not dispute the FCC's authority to adopt a NEPA-based categorical exclusion and other NEPA-based relief as part of this rulemaking proceeding. Pursuant to 40 C.F.R. § 1508.4, an agency may exclude by rule a category of actions "which do not individually or cumulatively have a significant effect on the human environment" upon a finding that such actions will have no such effect.[29] As PCIA and others have demonstrated, the proposed rules meet this standard by ensuring that only minimally impactful installations that do not have a

---

[25] *See* Letter from D. Zachary Champ, Government Affairs Counsel, PCIA – The Wireless Infrastructure Association, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 12-354, WC Docket No. 11-59, at 3 (July 22, 2013).

[26] *See* AT&T at 9; PCIA at 17; Sprint at 6; TIA at 3-4; UTC at 3-4; Verizon at 15; WISPA at 12-13.

[27] *See id*.

[28] While a few commenters expresses concern that the rule change should not apply to water tanks due to the potential for water contamination during installation, *see* Comments of Steel in the Air, Inc. ("Steel in the Air") at 2-3; Comments of the City of West Palm Beach, Florida ("West Palm Beach, FL") at 2-3, the proposed change will have no impact on water purity. The FCC does not currently examine water quality as part of its environmental review. *See* 47 C.F.R. §§ 1.1306, 1.1307.

[29] 40 C.F.R. § 1508.4; *see also id*. § 1507.3(b)(2)(ii).

significant effect on the environment are categorically excluded.[30] Furthermore, consistent with Section 1508.4, the FCC's rules already provide a safety net for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.[31]

While some commenters profess concerns regarding NEPA-based relief, in many cases these concerns do not relate to NEPA at all; instead, they relate to historic preservation concerns like aesthetic effects or archeological impacts relevant under the NHPA,[32] which are addressed separately below.[33] In other cases, the concerns expressed regarding PCIA's volume-based proposal are nothing more than conclusory, unsupported, or speculative statements[34] that should be disregarded out of hand.[35]

---

[30] *See* PCIA at 9; *see also* Ass'n of American Railroads at 5-6 & n.15, 14; Fibertech at 14; UTC at 6.

[31] *See* 47 C.F.R. § 1.1307(c) (permitting an interested person alleging that an otherwise categorically excluded action "will have a significant environmental effect" to file a petition "setting forth in detail the reasons justifying or circumstances necessitating environmental considerations in the decision-making process"); *id*. § 1.1307(d) (permitting the Bureau to require preparation of an environmental assessment if it determines that an otherwise categorically excluded action "may have a significant environmental impact").

[32] *See* D.C. at 24-25; Comments of the City of Eugene, Oregon ("Eugene, OR") at 28-29; Comments of the Town of Hillsborough, California ("Hillsborough, CA") at 4; Comments of the City of San Antonio, Texas ("San Antonio, TX") at 30-31; Comments of the County of San Diego, California ("San Diego, CA") at 2.

[33] *See* discussion *infra* Section I.C.

[34] *See* Comments of the Piedmont Environmental Council ("Piedmont Envt'l Council") at 14; Steel in the Air at 3; West Palm Beach, FL at 3.

[35] *See, e.g.*, *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, Second Order on Reconsideration of the Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 25020, 25043 ¶ 48 (2000) (dismissing comment that was "wholly speculative" and "failed to provide any evidence").

Finally, arguments that any environmental streamlining must be linked to the FCC's handling of Section 6409(a) lack merit.[36] The two are not related—streamlining the FCC's federal environmental procedures has no impact on local review processes. In any event, the proposed streamlining would apply where any environmental impacts are at most negligible, making streamlined environmental review at all levels appropriate.

C. The FCC Should Exercise Its Authority to Adopt an NHPA-Based Exclusion for DAS and Small Cell Installations, Along with Other Targeted Relief.

A diverse group of commenters also express support for streamlining the historic preservation review of DAS and small cells under the NHPA. For example, wireless carriers, infrastructure providers, equipment manufacturers, railroad representatives, and utility groups all agree that streamlined NHPA-based review is warranted for DAS and small cells given their non-existent or at most minimal impacts on historic resources.[37] Localities likewise recognize that DAS and small cells could "be subject to more streamlined review,"[38] and that "streamlining historic preservation review" could be "an efficient process which could still achieve its desired purpose."[39] Even preservationists concede that "a great number of these installations could potentially have little to no effect on historic resources."[40] As the Ohio Historic Preservation Office explains, "[t]he ability to install DAS and small cell equipment on light and utility poles

---

[36] *See* Comments of the City of Alexandria, Virginia, *et al*. ("Alexandria, VA") at 60-63; Eugene, OR at 27-28; *see also* San Antonio, TX at 31.

[37] *See* Ass'n of American Railroads at 5-12; AT&T at 2, 10-17; Crown Castle at 5; CTIA at 22; ExteNet at 4; PCIA at 6-15; Qualcomm at 3; Sprint at 3-6; TIA at 3; Towerstream at 32; UTC at 3, 7; Verizon at 9-11; WISPA at 12, 16-17.

[38] D.C. at 25.

[39] Mendham Borough, NJ at 4.

[40] Comments of the National Conference of State Historic Preservation Officers ("NCSHPO") at 1-2.

and its overall smaller size seem to make its deployment less likely to affect historic properties because of reduced visibility and less of a need for new, large towers."[41]

Given these non-existent or at most minimal impacts, many commenters support categorically excluding the same DAS and small cell facilities for purposes of NHPA review as PCIA has proposed to exclude for NEPA review.[42] As Crown Castle explains,

> [s]uch an appropriately-defined exclusion, included as part of Note 1 to Section 1.1306 of the Commission's rules, will ensure that only minimally invasive installations (that do not have an adverse effect on the environment or historic properties) qualify for exemption from environmental and historic preservation review. This modification to Note 1 will enable carriers to expeditiously deploy DAS and Small Cell facilities without being mired in unnecessary, burdensome, and costly regulatory procedures.[43]

The Utilities Telecom Council likewise "agrees with PCIA that . . . add[ing] DAS and small cell solutions to the list of facilities that are categorically excluded . . . would satisfy the Commission's responsibilities under the NHPA," and "[t]he Commission should adopt the same standards for exclusion under NHPA as it adopts for NEPA."[44]

Commenters also support other targeted NHPA-based relief. For example, commenters agree with PCIA that the Commission should expand the existing corridor exclusion to include DAS and small cell installations and associated components, including comparably-sized new support structures and hub sites, in or near those corridors.[45] Commenters similarly support excluding collocations on utility poles without regard to their age, *i.e.*, whether or not they are

---

[41] Ohio at 1-2.

[42] *See* Ass'n of American Railroads at 9-10; AT&T at 14-17; Crown Castle at 5; ExteNet at 4; Sprint at 3-4, 6; TIA at 3-4; Towerstream at 30; UTC at 6-7; WISPA at 15-17; Verizon at 10-11.

[43] Crown Castle at 5.

[44] UTC at 7.

[45] *See* AT&T at 17-18; Fibertech at 11-12; PCIA at 18-20; UTC at 6; *see also* Steel in the Air at 3 (noting that "the proposal for exclusions along existing aerial or underground corridors has some merit"); West Palm Beach, FL at 3 (same).

more than 45-years old.[46] As WISPA notes, "[t]here is no evidence that utility distribution poles possess any historic value or that collocations on such structures could result in adverse effects to any such historic value."[47] Indeed, even preservationists like the Arkansas Historic Preservation Program recognize that an exclusion for utility poles older than 45 years makes sense: "We are in general not opposed to the exclusion of review for utility poles older than 45 years in age, as we feel that the addition of DAS structures to existing poles would not cause an adverse effect."[48] Moreover, the record highlights the pressing need for this exclusion as an increasing number of utility poles are reaching the 45 year eligibility period.[49]

PCIA agrees with Verizon that the FCC should also exclude collocations on buildings and other non-tower structures regardless of age if: (1) the antennas being added are in the same location as other antennas previously deployed; (2) the height of new antennas does not exceed the height of the existing antennas by more than three feet or the new antennas are not visible

---

[46] *See* PCIA at 21-22; UTC at 8; Verizon at 13-14; WISPA at 17-18; *see also* Fibertech at 15 (asserting that collocations on structures in public rights-of-way should be excluded regardless of the age of the structure).

[47] WISPA at 18.

[48] Arkansas at 1-2; Comments of California Office of Historic Preservation at 2 (recommending Section 106 exemption for utility poles 45 years and older); *see also* D.C. at 25-26 ("It is possible that the DCSHPO could also exclude from review installations on utility poles."); Comments of Springfield, Oregon ("Springfield, OR") at 6 ("The age of a utility pole is of less consequence to the city's interest than inventoried historic buildings and [other] sites.").

[49] *See* Verizon at 17 n.38 (estimating that 70 to 80 percent of utility poles in the Northeast, and 50 to 60 percent of the utility poles in the Southwest, are 45 years old or older); Amos J. Loveday, Ph.D., *DAS/Small Cells & Historic Preservation: An Analysis of the Impact of Historic Preservation Rules on Distributed Antenna Systems and Small Cell Deployment*, at 3 (Feb. 27, 2013) ("DAS/Small Cell Report") (highlighting the growing number of utility infrastructure aged 45 years or older and preservation techniques to keep the support infrastructure in good working order), submitted as an Attachment to Letter from D. Zachary Champ, PCIA–The Wireless Infrastructure Association and The DAS Forum, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 11-59, GN Docket No. 12-354 (filed Mar. 19, 2013) ("PCIA March 19, 2013 *Ex Parte*").

from the ground; and (3) the new antennas comply with any requirements placed on the existing antennas by the state or local zoning authority or as a result of the previous historic preservation review process.[50] As Verizon explains, "the effect of adding antennas of a similar size to equipment that already exists at the same location on the structure will not be different than the [direct] effects, if any, created by the existing facilities," and "the effects of adding antennas to the existing facilities will not (as limited by the proposed rule) have an additional visual effect on [any historic district]."[51]

Many of the commenters supporting these measures recognize that the FCC has authority to adopt a rule excluding DAS and small cell facilities from NHPA review and provide other targeted NHPA-based relief pursuant to 36 C.F.R. § 800.3(a)(1), which provides that an agency has no further NHPA obligations "[i]f the undertaking is a type of activity that does not have the potential to cause effects on historic properties."[52] These commenters demonstrate that the Commission can and should interpret Section 800.3(a)(1) to exclude activities that may have *de minimis* effects on historic properties, consistent with the First Circuit decision in *Save Our Heritage*.[53] In light of this record and its authority under Section 800.3(a)(1), the Commission

---

[50] Verizon at 17-18.

[51] *Id*. at 18-19. Verizon also proposes to eliminate the need to conduct tribal reviews for collocations on structures that are older than 45-years in age, unless the structure is within 250 feet of tribal lands and visible from the ground level of those lands. *See* Verizon (21-22 & n.46). As Verizon demonstrates, such action will help minimize the need for tribes to divert resources to consider actions that will not affect tribal religious or cultural properties while reducing an unnecessary barrier to broadband deployment. *See id.*

[52] 36 C.F.R. § 800.3(a)(1); *see* AT&T at 13; Ass'n of American Railroads at 15; Fibertech at 14-15; PCIA at 9; Towerstream at 32; Verizon at 11-13.

[53] *Save Our Heritage, Inc. v. FAA*, 269 F.3d 49, 58, 62-63 (1st Cir. 2001) (holding that an agency need not find that there will be absolutely no effects to warrant a categorical exclusion; it can categorically exclude undertakings that have only "*de minimis*" effects); *see* Ass'n of American Railroads at 15-17; PCIA at 9; Towerstream at 32; Verizon at 12. The conclusory claim by the

(continued on next page)

should move quickly to adopt the proposed NHPA-based exclusion for Communications Facility Installations and other relief discussed herein and in PCIA's initial comments.[54]

While some commenters express concerns regarding the FCC's adoption of these measures,[55] these concerns are mostly conclusory, unsupported, or speculative statements and lack meaningful evidentiary support.[56] Moreover, these concerns are addressed by Section 1.1307(c) and (d) of the Commission's rules, which accounts for any extraordinary circumstances in which an excluded facility may have an adverse effect.[57] Tellingly, only one commenter even acknowledges this backstop, and it fails to demonstrate that the backstop is insufficient to address any rare or unexpected concerns that may arise if the proposed rules are adopted.[58] As UTC and others have explained, "it is sufficient to rely on Section 1.1307(c) and (d) of the Commission's rules, which directs the reviewing Bureau to require an EA for an otherwise categorically excluded deployment where the Bureau finds that the deployment may have a significant environmental impact."[59]

(footnote continued)
Arkansas Historic Preservation Program that Section 800.3(a)(1) does not apply where there may be *de minimis* effects is unsupported and ignores the *Save Our Heritage* precedent. *See* Comments of the Arkansas Historic Preservation Program ("Arkansas") at 1.

[54] *See* PCIA at 6-15.

[55] *See* American Cultural Resource Ass'n at 1; Arkansas at 2; D.C. at 25; Eugene, OR at 28; Mendham Borough, NJ at 4; NCSHPO at 1; Ohio Historic Preservation Office at 1; Piedmont Envt'l Council at 14; Salem, OR at 4; San Antonio, TX at 30-31; Springfield, OR at 5; Steel in the Air at 3-4; Tucson, AZ 3; West Palm Beach, FL at 3-4.

[56] *See supra* note 35.

[57] *See* 47 C.F.R. § 1.1307(c)-(d); *see also supra* note 31 and accompanying text.

[58] The Planning Board of Mendham, New Jersey suggests that the protection afforded by Section 1.1307(c)-(d) comes too late, but it fails to provide any showing that a post-discovery cure cannot remedy any alleged harm. *See* Mendham Borough, NJ at 4.

[59] *See* UTC at 7-8; *accord* PCIA at 22; Towerstream at 32; NPRM ¶¶ 59, 67; *see also Deployment of Text-To-911*, 26 FCC Rcd 13615, 13617 ¶ 4 (2011) (FCC should adopt the "least burdensome approach that would achieve the desired result").

II. THE RECORD DEMONSTRATES THE NEED FOR THE FCC TO ACT NOW TO INTERPRET AND ENFORCE SECTION 6409(a).

The record demonstrates the need to adopt rules that clarify and enforce Section 6409(a) of the Spectrum Act.[60] Accordingly, the FCC should utilize its broad authority to implement Section 6409(a) to achieve the statute's streamlining goals and remove deployment barriers. In particular, the FCC should adopt PCIA's proposed statutory interpretations, application procedures, and processing times. The FCC should also adopt a "deemed granted" remedy where jurisdictions fail to timely comply with the statute's "shall approve" mandate.

A. Rules Are Needed to Achieve Streamlining Goals, Ensure Consistency, and Avoid Protracted Litigation.

The FCC should move quickly to clarify and enforce Section 6409(a) through the adoption of new rules, which the record shows are needed to accomplish several important public interest goals. First, rules can help realize Section 6409(a)'s purpose of streamlining wireless facility siting, which in turn will facilitate rapid network upgrades and expanded wireless broadband coverage and capacity that benefits all Americans.[61] In the absence of FCC rules, municipalities have taken actions that have had the opposite effect.[62] Second, clear rules promote predictability and remove uncertainty, ensuring Section 6409(a) is applied consistently

---

[60] *See* CTIA at 9; ExteNet at 4; Joint Venture: Silicon Valley at 5-6; Comments of the New York State Wireless Association ("NY State Wireless Ass'n") at 1-2; PCIA at 24-28; Steel in the Air at 5; Towerstream at 7; Verizon at 27; WISPA at 4; *see also* Comments of Portland Design Commission ("Portland Design Commission") at 4; West Palm Beach, FL at 5.

[61] *See* NY State Wireless Ass'n at 1-2; PCIA at 24; Steel in the Air at 5; Verizon at 27; *see also* 158 CONG. REC. E237, E239 (daily ed. Feb. 24, 2012) (remarks of Rep. Upton) (explaining that the purpose of Section 6409(a) is to "streamline[] the process for siting of wireless facilities by preempting the ability of State and local authorities to delay collocation of, removal of, and replacement of wireless transmission equipment").

[62] For instance, the New York State Wireless Association explained that efforts undertaken by some municipalities run "counter to Section 6409(a) and its intent to streamline municipal permitting." NY State Wireless Ass'n at 2.

in state and local jurisdictions across America so that all parties know the "rules of the road," and broadband service and infrastructure providers can confidently invest the requisite, significant amounts of capital.[63] Finally, rules can help avoid a "quagmire" of litigation over the meaning of undefined terms[64] and prevent Section 6409(a) from being misconstrued by localities or courts, as has unfortunately been the case with Section 332(c)(7) of the Communications Act.[65]

Despite claims to the contrary,[66] the record shows that best practices alone are not a substitute for clear, predictable federal rules.[67] As the FCC has explained, "in the absence of definitive guidance from the Commission, the uncertainties under Section 6409(a) may lead to protracted and costly litigation and could adversely affect the timely deployment of a nationwide public safety network and delay the intended streamlining benefits of the statute with respect to other communications services."[68] Therefore, the FCC should focus on implementing and providing expert guidance on the existing law.

While rules are needed now to provide clear guidance and settled interpretations upon which all stakeholders can rely, once those rules are adopted, the FCC should engage in

---

[63] CTIA at 9-10; Joint Venture: Silicon Valley at 5; PCIA at 25; Steel in the Air at 5; Verizon at 27; WISPA at 4; *see* West Palm Beach, FL at 5 ("We believe it is appropriate for the Commission to adopt rules and interpretations regarding Congress' intent regarding Section 6409 because of the divergent views already taken by industry and regulatory authorities in the absence of clarity.").

[64] Towerstream at 7; Verizon at 27.

[65] PCIA at 24 n.85 (noting that despite the passage of eighteen years since Section 332(c)(7) was enacted, there is still a lack of clarity over the meaning of essential provisions); *see also* ExteNet at 4.

[66] *See* Colorado Comms. at 16-19; D.C. at 7; Eugene, OR at 4-5; Comments of the Intergovernmental Advisory Committee ("IAC") at 3-4; Comments of the National Association of Telecommunications Officers and Advisors, *et al.* ("NATOA") *et al.* at 7-8; San Antonio, TX at 7.

[67] *See* AT&T at 21; PCIA at 25-26.

[68] NPRM ¶ 97.

educational outreach regarding the new rules and encourage best practices to build on the FCC's principles. Best practices can facilitate siting applications that are not subject to expedited review under Section 6409(a) and help local jurisdictions incent the placement of wireless facilities in preferred areas through streamlined review.[69]

B. The FCC Has Broad Authority to Implement Section 6409(a) and Remove Deployment Barriers.

The record reinforces the FCC's broad authority to adopt rules implementing and enforcing Section 6409(a). As PCIA and others explained, Section 6409(a) was enacted as part of the Spectrum Act, and Section 6003(a) of that statute provides the FCC with authority to "implement and enforce this title as if this title is a part of the Communications Act."[70] No party challenges the FCC's authority under Section 6003(a) to adopt rules. Commenters also recognize that the FCC's authority to adopt rules is "bolstered by the broader authority conferred by Section 706" of the Telecommunications Act,[71] which directs the Commission to "remove barriers to infrastructure investment" and take steps to accelerate broadband deployment.[72] Indeed, the D.C. Circuit recently held that Section 706 is an affirmative grant of authority to the Commission.[73] Accordingly, the Commission is fully within its authority to adopt rules implementing Section 6409(a), and should do so expeditiously.

---

[69] *See* PCIA at 25-26.

[70] Spectrum Act, § 6003(a), 126 Stat. 204, *codified at* 47 U.S.C. § 1403(a); *see also* PCIA at 25; *see* WISPA at 4; Verizon at 27.

[71] Towerstream at 8; *see* Fibertech at 7.

[72] 47 U.S.C. § 1302(a)-(b).

[73] *Verizon v. FCC*, 2014 U.S. App. LEXIS 680, *31-39, *42-43 (D.C. Cir. 2014).

C. The FCC Should Adopt PCIA's Proposed Interpretations, Application Procedures, and Processing Times.

The record supports action by the FCC in this proceeding to define key statutory terms and specify application procedures and timelines, as PCIA and others have proposed.[74] Given the need to adopt and enforce new rules and the FCC's clear authority to do so, the FCC should move quickly to implement the rules as discussed below and in PCIA's initial comments.

Non-discretionary review. Commenters demonstrate that the "may not deny, and shall approve" mandate in Section 6409(a) requires states and localities to approve all eligible facilities requests ("EFRs") without exception and without discretionary review.[75] This means that legal, non-conforming structures must be made available for modifications under Section 6409(a),[76] allowing existing infrastructure to be put to its best use. This also means that local restrictions on fall zones and setbacks cannot be used to deny an otherwise qualified application,[77] nor can an EFR be denied based upon purported inconsistencies with a jurisdiction's zoning plan or upon aesthetic concerns.[78] To find otherwise would allow the

[74] *See* CTIA at 9-19; ExteNet at 4; Joint Venture: Silicon Valley at 5-7; NY State Wireless Ass'n at 1-2; PCIA at 24-53; Steel in the Air at 5-8; Towerstream at 7-29; Verizon at 27-33; WISPA at 4-11; *see also* Portland Design Commission at 4; West Palm Beach, FL at 5.

[75] *See* CTIA at 14-15; Fibertech at 31; PCIA at 40-44; Sprint at 11.

[76] *See* Crown Castle at 14; CTIA at 15-16; PCIA at 43-45.

[77] *See* CTIA at 14-15; PCIA at 45.

[78] Sprint at 11; PCIA at 41. For the request to qualify as an EFR, any visual mitigation, such as concealment, stealthing, or screening, should be consistent with the mitigation currently in existence. *See* Crown Castle at 14; PCIA at 45-46. If the proposed collocation defeats the effect of the mitigation, it constitutes a substantial change. *See id*; *see also* AT&T at 24 (positing that swapping out antennas or equipment completely obscured by camouflage—such as those inside a church steeple—are an EFR so long as the "antennas or equipment remain camouflaged or screened").

purpose of Section 6409(a) to be circumvented at will with simple changes to local codes that turn existing infrastructure into legal, non-conforming uses or otherwise render it unavailable.[79]

While state and local jurisdictions cannot apply discretionary review processes to EFRs, they can require compliance with general building codes or other objective, ministerial laws reasonably related to health and safety – so long as the laws are clearly related to non-discretionary standards, such as the widely-adopted standards set forth in ANSI and TIA-222.[80] As Sprint explains, "[w]ireless facilities may still be subject to building code and other *non-discretionary* structural and safety codes."[81]

Substantially change the physical dimensions. Commenters recognize that the definition of "substantially change the physical dimensions" should generally parallel the four-part test for "substantial increase in the size" in the Collocation Agreement.[82] However, the fourth prong of the test should be modified to reflect the more recent guidance in the 2004 NPA.[83] Having the test under Section 6409(a) hew closely to the test contained in the Collocation Agreement and

---

[79] CTIA at 14-15.

[80] *See* Joint Venture: Silicon Valley at 6-7; PCIA at 41-42. Most states have adopted the TIA-222 standard to determine the structural requirements for antenna support structures. *See, e.g.*, W. VA. CODE § 2.2-1150.2(B)(1)(c); HAW. ADMIN. RULES § 3-180-53 App. W (providing exception to wind load determinations for structures that comply with TIA/EIA-222); *see also TR-14 Structural Standards for Communication and Small Wind Turbine Support Structures*, TELECOMMUNICATIONS INDUSTRY ASSOCIATION, http://www.tiaonline.org/all-standards/committees/tr-14 (last visited Mar. 3, 2014).

[81] Sprint at 11 (emphasis added).

[82] *See* AT&T at 24; CTIA at 13-14; PCIA at 37-38; Sprint at 10; Verizon at 29-30; Nationwide Programmatic Agreement for Collocation of Wireless Antennas, § I.C, codified at 47 C.F.R. Part 1, Appendix B ("Collocation Agreement"); *see also* UTC at 13 (supporting the Collocation Agreement test, but with a higher height threshold).

[83] *See* CTIA at 13-14; PCIA at 37-38; Sprint at 10; Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, § III.B, codified at 47 C.F.R. Part 1, Appendix C ("2004 NPA").

2004 NPA will provide consistency and certainty to providers and reduce administrative burdens on all parties.

While some commenters claim "substantially change" should encompass appearance-related changes like aesthetic or visual alterations,[84] such an interpretation is contrary to the express terms of the statute. Section 6409(a) clearly ties a substantial change to one that impacts the "physical *dimensions*"—not physical appearance—of an existing tower or base station.[85] Basing a substantial change on a subjective interpretation of a structure's appearance would thwart the streamlining purpose of the statute and turn what is intended to be a non-discretionary review process into an unpredictable analysis and adjudication of innumerable factors.[86]

Streamlined application procedures. The record supports the establishment of rules that will help jurisdictions streamline their application procedures for EFRs.[87] For example, the FCC should specify that an EFR application may require only the information needed to confirm that the request is covered under Section 6409(a).[88] The FCC should also clarify that certain types of information are not relevant for an EFR—for instance, any requirement to demonstrate "proof of

[84] *See* Am. Cultural Resource Ass'n at 2; Colorado Comms. at 11-12; IAC at 4-5; Comments of NJ State League of Municipalities ("NJ League") at 5-6; Comments of Tempe, AZ ("Tempe, AZ") at 21-22.

[85] *See* CTIA at 14 ("[T]he reference to 'physical dimensions' . . . relates to empirically measurable dimensions (height and width, for example) and not subjective evaluations such as visual effect.").

[86] Note that existing visual mitigation must be maintained for the request to qualify as an EFR. *See supra* note 78.

[87] *See* Crown Castle at 11-12; PCIA at 46-49; Sprint at 10-11; Towerstream at 24.

[88] Crown Castle at 11-12 ("[An EFR application] should include only: (1) a signed application form, including a statement certifying that the application is an eligible facilities request; (2) a demonstration of the applicant's entitlement or authorization to pursue the application; and (3) a site plan or diagram showing that the application does not involve a substantial change to the physical dimensions of the subject tower or base station. An application may also include a stamped engineering report demonstrating compliance with applicable structural standards."); Sprint at 10-11; Towerstream at 24.

need" or the business case for the proposed modification.[89] Specifying reasonable limits application procedures and information requirements will help achieve the statute's streamlining goals, create predictability and clarity in the application process, and reduce administrative burdens on all parties.

Expedited processing timeline. The record reflects diverse support for establishing a consistent federal rule governing the processing timeline for EFRs.[90] As commenters suggest, the FCC should require approval of EFR requests within no more than 45 days.[91] An expedited timeline is warranted by the narrow scope of review now permitted for EFR applications and to help achieve the statute's streamlining goals. Given the limited review now permitted for EFR applications, any arguments advocating longer timeframes are simply not credible.[92] Longer timeframes are also contrary to the statute's goal of removing barriers that delay the approval of EFRs.[93]

Preemption of moratoria. Consistent with the record, the FCC should make clear that Section 6409(a) preempts moratoria on EFRs.[94] Without preemption, moratoria can be enacted

---

[89] Crown Castle at 11-12; PCIA at 47.

[90] *See* CTIA at 16-19; Fibertech at 32; PCIA at 46-49; Towerstream at 25; UTC at 15; Verizon at 31-32; *see also* Comments of the League of California Cities, *et al.* ("League of CA Cities") at 22-23 (underscoring the need for a "reasonable review period"); Mendham Borough, NJ at 6 (noting that any federal time period should "recognize[] not only the carrier's desire to move forward . . . but also the needs of the approving authority").

[91] *See* CTIA at 16-19; PCIA at 46-49; Verizon at 31-32; *see also* Towerstream at 25 (proposing a 30-day review period).

[92] *See* Alexandria, VA at 44-45; D.C. at 18; NJ League at 7; Steel in the Air at 8; Tucson, AZ at 9; West Palm Beach, FL at 8.

[93] *See* 158 CONG. REC. E237, E239 (daily ed. Feb. 24, 2012) (remarks of Rep. Upton) (explaining that Section 6409(a) seeks to "preempt[] the ability of State and local authorities to delay collocation of, removal of, and replacement of wireless transmission equipment").

[94] *See* CTIA at 18; PCIA at 46-49; Towerstream at 26; *see also* NPRM ¶ 135.

and repeatedly extended, contrary to the statute's goals. For example, the record shows that the City of Hillsborough, California adopted a moratorium in 2012 after Section 6409(a) was enacted and already has extended that moratorium twice.[95] Because Section 6409(a) actually reduces localities' application review burdens,[96] moratoria are not necessary to draft implementation and application procedures.

Application to municipal property. Along with many commenters, PCIA agrees that Section 6409(a) applies to municipalities acting in their role as land use regulators, *i.e.*, when making regulatory and administrative decisions on land use and managing the public rights-of-way or dedicated utility easements. It does not apply to municipalities acting in their capacity as property owners, *i.e.*, when acting as the owner of property over which the municipality exercises traditional ownership rights, such as exclusive access and use for its own purposes.[97] The FCC, however, should make it clear that while Section 6409(a) does not apply to municipalities acting in a proprietary or contractual capacity regarding municipal-owned property, it *does apply* to municipal review of wireless facility deployments in areas that the municipality dedicates, manages, and maintains for regular access and use by the public or by privately regulated utilities, such as the public rights-of-way or dedicated utility easements.

---

[95] CTIA at 19.

[96] *See supra* notes 88-89 and accompanying text.

[97] *See* Chicago, IL at 5-6; D.C. at 19; Eugene, OR at 5-6; Comments of Fairfax County, Virginia ("Fairfax, VA") at 14-15; Fibertech at 29; IAC at 7; League of CA Cities at 16-17; NATOA at 14; New York, NY at 3; Steel in the Air at 7; Tempe, AZ at 24; Valley Center at 1-2; Virginia Dept. of State Police at 4; West Palm Beach, FL at 7.

D. The FCC Should Adopt a Deemed Granted Remedy Where Jurisdictions Fail to Timely Abide by the "Shall Approve" Mandate.

The record supports treating EFR applications as "deemed granted" if they are not timely approved in accordance with Section 6409(a).[98] Because review of an EFR application is non-discretionary and an EFR application must be granted, there is no reason why a locality should be able to defer action and avoid a deemed grant.[99] As the New York State Wireless Association explains, "[a] municipality should not be able to unilaterally extend beyond any reasonable time required to review that which Congress has already identified must be 'approved' by state and local agencies."[100] Nor should applicants be required to employ costly and delay-prone judicial or FCC remedies,[101] as these may only encourage jurisdictions to use the delay to seek concessions[102] and conflict with the express statutory requirement that EFRs be approved and not denied.[103]

Instead, a deemed granted rule designed to "address only clear cases of state or local foot-dragging"[104] would be entirely consistent with, and fulfill, Congress's intention to ensure approvals without delay and without intruding on the authority of state and local officials. Specifically, a deemed granted rule would "streamline[] the process for siting of wireless facilities by preempting the ability of State and local authorities to delay collocation of, removal

---

[98] *See, e.g.*, AT&T at 25-28; Fibertech at 31-32; NY State Wireless Ass'n at 2; PCIA at 50-53; Sprint at 11; Towerstream at 27; Verizon at 32-33.

[99] *See* AT&T at 26.

[100] Comments of the NY State Wireless Ass'n at 2.

[101] *See* Verizon at 32; AT&T at 26.

[102] *See, e.g.,* AT&T at 26.

[103] *See* Sprint at 11; Towerstream at 27.

[104] Mendham Borough, NJ at 6.

of, and replacement of wireless transmission equipment."[105] As the record shows, this approach would be consistent with the Commission's adoption of deemed granted rules to expedite approvals in the case of pole attachments[106] and in the area of video franchising.[107]

While one commenter suggests that "[n]othing in Section 6409(a) grants the Commission enforcement authority" to adopt a deemed granted rule or other remedies,[108] in fact the FCC has clear and explicit statutory authority to enforce Section 6409(a). As discussed above, Section 6003(a) of the Spectrum Act specifically authorizes the FCC to "implement and enforce" Section 6409(a) as if it were part of the Communications Act.[109] Moreover, the FCC has broad authority to adopt rules to implement and enforce the provisions of the Communications Act,[110] which the courts have repeatedly sustained.[111]

Arguments that review of zoning authorities' actions or inactions on EFRs must be reserved to the courts as a matter of law or policy, to the exclusion of a deemed granted remedy,

---

[105] *See* 158 CONG. REC. E239 (daily ed. Feb. 24, 2012) (extended remarks of Rep. Upton).

[106] *See* Fibertower Comments at 32; *see generally* NPRM, 28 FCC Rcd at 14288 n.275.

[107] *See* Verizon at 33 (citing *Implementation of Section 621(a)(1) of the Cable Communications Policy Act*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5138-5140 (2007), *aff'd sub nom. Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008)).

[108] D.C. at 19. The District of Columbia also argues that a deemed granted approach "would severely usurp State and local government authority in a manner that is not suggested in Section 6409(a)." D.C. at 20. However, State and local governments do not have authority to deny an EFR; they must grant it. As a result, the deemed grant would "usurp" no authority at all, but would simply ensure that State and local governments who fail to comply with their duty under Section 6409(a) cannot stand in the way of the congressional mandate being achieved.

[109] Spectrum Act, § 6003(a).

[110] *See* 47 U.S.C. §§ 154(i), 201(b), 303(r); *see also* 47 U.S.C. § 1302(a)-(b).

[111] *See, e.g., City of Arlington v. FCC*, 133 S. Ct. 1863, 1866 (2013) ("*City of Arlington*"); *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 980-981 (2005); *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 378 (1999); *Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008).

are unavailing.[112] For example, some parties argue that the judicial review provision of Section 332(c)(7)(B)(v) governs exclusively in Section 6409(a) cases.[113] There nothing in the Spectrum Act, however, to support such an assertion, nor is there anything in Section 332(c)(7) indicating that its judicial review remedy is exclusive or that it precludes a deemed granted rule.[114] In any case, because Section 332(c)(7) only applies to "personal wireless service" facilities,[115] its judicial review remedy is not available to an entire class of EFRs—those that do not involve personal wireless service facilities. While the City of Alexandria suggests that state law procedures should govern in such cases, [116] there is nothing in the Spectrum Act or its legislative history to indicate that Congress intended such inconsistent approaches to enforcement of Section 6409(a) – and certainly nothing that would preclude a unified deemed granted remedy that applies to all cases of inaction on EFRs.

While the Colorado Communications and Utilities Alliance argues that any remedy should always be in court as a matter of "[f]undamental fairness," arguing that there is no reason to create "special class" status for the wireless industry and "afford it a favored forum,"[117] in fact Congress has twice found it necessary to legislate about local zoning restrictions that impair the wireless industry's ability to deploy advanced wireless services.[118] And Congress has provided the FCC with the legal authority to fill in the interstices of Section 6409(a) and provide a

---

[112] *See, e.g.*, Alexandria, VA at 45-47; Colorado Communications and Utility Alliance, *et al.* ("Colorado Comms.") at 15-16, 22-25; Eugene, OR at 21-22; San Antonio, TX at 23-25.

[113] *See* Alexandria, VA at 45; San Antonio, TX at 23-24.

[114] *See* Spectrum Act, § 6409(a); 47 U.S.C. § 332(c)(7)(B)(v).

[115] *See* 47 U.S.C. § 332(c)(7).

[116] *See* Alexandria, VA at 45.

[117] Colorado Comms. at 16.

[118] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), *codified at* 47 U.S.C. § 332(c)(7); Spectrum Act, §6409(a).

structure that will make it enforceable and effective.[119] The deemed grant of EFR applications after the passage of 45 days is the most effective way to carry out Congressional intent.

Finally, a deemed granted rule does not present constitutional concerns. While some commenters claim that a deemed granted rule would violate the Tenth Amendment by magnifying Section 6409(a)'s claimed intrusion on local authority,[120] in fact a deemed granted rule would not force states or localities to "administer a federal regulatory program."[121] Rather, jurisdictions would have the choice of processing EFR applications consistently with federal law governing interstate commerce when they administer their state and local regulatory programs, or they could simply decline to act on an application and allow it to be approved by operation of law—thus eliminating any compulsion to act on behalf of the federal government.[122]

III. COMMENTERS SUPPORT TAKING FURTHER STEPS TO CLARIFY THE SHOT CLOCK AND INTERPRET SECTION 332(c)(7).

As discussed below, the record supports action by the FCC to further clarify the *Shot Clock Order*.[123] Consistent with the deemed granted remedy compelled by Section 6409(a) for EFR applications, the record also supports FCC adoption of a deemed granted remedy for violations of the Shot Clock using the Commission's authority to interpret Section 332(c)(7).

---

[119] *See* Spectrum Act, § 6003(a).

[120] *See, e.g.*, Alexandria, VA at 46; D.C. at 20; Eugene, OR at 7, 22; Fairfax, VA at 19; League of CA Cities at 25-27; Salem, OR at 12-13; *see also* Tucson, AZ at 10; West Palm Beach, FL at 9; NATOA at 8.

[121] *Printz v. United States*, 521 U.S. 898, 933 (1997) (quoting *New York v. United States*, 505 U.S. 144, 188 (1992)).

[122] *See* Fibertower at 32.

[123] *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994 (2009) ("*Shot Clock Order*"), *recon. denied*, 25 FCC Rcd 11157 (2010), *aff'd sub nom. City of Arlington v. FCC,* 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013).

A. The FCC Should Provide Further Clarity Regarding the Shot Clock.

Numerous commenters demonstrate that the FCC should take steps to clarify the operation of the Shot Clock, using its authority to interpret Section 332(c)(7), as outlined below.

Accelerated processing time. For consistency with Section 6409(a) and the 45-day processing time recommended above, the FCC should modify the collocation prong of the Shot Clock to require action within 45 days.[124] This will avoid any confusion over the relationship between Section 6409(a) and the Shot Clock.[125] Given the "shall approve" mandate of Section 6409(a), most collocations require only administrative approval; as such, a reduction in processing time from 90 days to 45 days is warranted.[126]

Substantial increase. The FCC should apply the test for "substantial increase in size" under Section 332(c)(7) in the same manner as it interprets the test under Section 6409(a) for substantial change in physical dimensions.[127] The plain meaning of like terminology permits the Commission to read the tests together.[128] A uniform test also will facilitate consistent application by all stakeholders and reduce delay.[129]

Moratoria. The FCC should make clear that the Shot Clock time period runs regardless of any moratoria.[130] As the record shows, jurisdictions have enacted moratoria in an effort to

---

[124] *See* CTIA at 16-19.

[125] *See* CTIA at 16.

[126] *See* CTIA at 17-18.

[127] *See* AT&T at 7-8, 28; PCIA at 53-54; TIA at 6; UTC at 16.

[128] *See* AT&T at 29 ("Absent clear Congressional direction otherwise, there is no compelling reason to adopt inconsistent definitions for similar or identical terms.").

[129] *See* AT&T at 7-8, 28-29; PCIA at 54.

[130] *See* AT&T at 30; Crown Castle at 15; ExteNet at 7; PCIA at 55.

circumvent application of the Shot Clock.[131] Allowing jurisdictions to circumvent the Shot Clock's predictable timeframes through the adoption of moratoria directly contravenes the purpose of the Shot Clock. Accordingly, the FCC should use this proceeding to close this loophole and obviate the need for applicants to engage in costly and time-consuming litigation to combat such attempts to undermine the Shot Clock rule.[132]

Application completeness. The FCC should clarify the standards by which an application is determined to be complete for purposes of triggering the Shot Clock timeframes.[133] Further, the Commission should establish a notification process for incomplete applications to prevent municipalities from using burdensome information requests beyond the scope of the statutorily permissible review to delay deployment.[134] As discussed above with respect to Section 6409(a), specifying application completeness procedures will give all parties clarity and prevent undue delay and waste of both public and private resources.[135]

Application to DAS and small cell facilities. The Shot Clock should be applied in a technology-neutral manner to speed deployment of all wireless facility installations, including DAS and small cells. The FCC therefore should clarify that the Shot Clock's presumptively reasonable timeframes apply to DAS and small cell facilities.[136]

Discriminatory municipal preferences. The FCC should declare that ordinances establishing preferences for the placement of wireless facilities on municipal property are

---

[131] *See* AT&T at 30; ExteNet at 7; PCIA at 55.

[132] *See* AT&T at 30; ExteNet at 7; PCIA at 55.

[133] *See* AT&T at 29; Crown Castle at 15-17; ExteNet at 6; PCIA at 54-55.

[134] *See* AT&T at 29; Crown Castle at 15-17; ExteNet at 6; PCIA at 54-55.

[135] *See infra* Section II.C.

[136] *See* CTIA at 21-22; ExteNet at 7; Fibertech at 33-34; PCIA at 55-56; Sprint at 12.

unreasonably discriminatory.[137] Ordinances that discriminate against non-municipal sites can conflict with a provider's network needs and limit the number of available potential sites, slowing deployment. By declaring these preferences unreasonably discriminatory under Section 332(c)(7), the FCC will maximize the number of possible sites that are available for the installation of wireless facilities and avoid unnecessarily discriminatory and anti-competitive impacts.[138]

B. The FCC Should Adopt a Deemed Granted Remedy Where Jurisdictions Fail to Abide by the Shot Clock.

The record supports modifying the Shot Clock to incorporate a deemed granted provision that applies to applications for both new wireless facilities deployments and substantial modifications to existing facilities, in addition to those modifications covered by Section 6409(a).[139] Commenters stress that a deemed granted rule is critical to allow resources to be used to fund broadband deployment instead of litigation.[140] For example, several commenters cite *Crown Castle v. Town of Greenburgh*[141]—a case in which it took four years before the Second Circuit ordered the grant of the permits at issue—as an example of the type of litigation a

---

[137] *See* CTIA at 20-21; UTC at 17; PCIA at 56.

[138] *See* CTIA at 20-21.

[139] *See* AT&T at 30-31; CTIA at 19-20; Fibertech at 35; Joint Venture: Silicon Valley at 8; PCIA at 56-59; Sprint at 12; UTC at 17.

[140] UTC at 17; *accord* Joint Venture: Silicon Valley at 8 ("The Commission's goal should be to direct resources to support wireless broadband deployment, not costly and time-consuming litigation. . . . A 'deemed granted' remedy will 'reduce costly and time consuming litigation, allowing those resources to be used to fund rather than defend the expansion of broadband deployment,' which is in everybody's best interest.") (quoting NPRM, 28 FCC Rcd at 14296 (in turn quoting PCIA)); Sprint at 12 (observing that the delay inherent in pursuing judicial remedies "will ultimately hinder the rollout of broadband services and affect customers' ability to utilize advanced wireless service offerings").

[141] *Crown Castle NG East Inc. v. Town of Greenburgh*, No. 13-cv-2921, 2014 WL 185012, 2014 U.S. App. LEXIS 925 (2d Cir. Jan. 17, 2014) (unpublished).

deemed granted rule is needed to avoid.[142] Another commenter noted that numerous wireless facility siting lawsuits are pending in the San Francisco Bay area alone.[143] As AT&T points out, in the absence of a deemed granted rule, "jurisdictions intent on blocking wireless facility deployments frequently leverage their ability to force applicants to resort to judicial action for relief from delayed site reviews and approvals."[144]

Given Congress's clear indication that the processing and approval of wireless facilities applications should be expedited, the Commission can and should exercise its broad authority to adopt a deemed granted rule to carry out the objectives of the Communications Act and to facilitate broadband deployment—including its authority to implement Section 332(c)(7), as confirmed by the Supreme Court in *City of Arlington*.[145] While some commenters argue that a deemed granted remedy cannot be squared with the judicial review provision in Section 332(c)(7)(B)(v) —alleging, for example, it would "impermissibly usurp" the jurisdiction of a reviewing court—this is not the case.[146] A deemed granted remedy would simply eliminate the need for judicial review in a subset of cases—those where the Shot Clock has elapsed without action. Where an applicant requires an actual approved permit and one has not been issued

---

[142] *See* Fibertech at 5; Joint Venture: Silicon Valley at 8.

[143] Joint Venture: Silicon Valley at 8 (citing "San Francisco, Oakland, Burlingame, Hillsborough, and Albany, to name a few").

[144] AT&T at 30-31.

[145] *See* PCIA at 57-59 (citing *City of Arlington*, 133 S. Ct. at 1871-75); *see also* CTIA at 20 (citing "the clear congressional intent to facilitate siting decisions through a deemed granted approach"); AT&T at 31 ("Since the Commission declined to adopt a 'deemed granted' remedy, Congress has passed Section 6409, which mandates approval of applications seeking to deploy wireless equipment as a collocation notwithstanding Section 332(c)(7). Thus, Section 6409 reflects a direction from Congress that collocation applications should not be delayed.").

[146] Eugene, OR at 19; San Antonio, TX at 22; *accord* Alexandria, VA at 51-52; Colorado Comms. at 26-27; Fairfax, VA at 21-22; IAC at 9; League of CA Cities at 36; NATOA Comments at 15; Steel in the Air at 10-11; West Palm Beach, FL at 11.

following a deemed grant, however, the applicant would retain the option of seeking an order from a court of competent jurisdiction directing the issuance of the permit.[147] And States and localities would still have the opportunity to go to court to seek a finding that a deemed grant has not been actually triggered.[148]

Contrary to the City of Alexandria's claims, the FCC does not "lack[] authority to determine the scope of available judicial remedies or to create an administrative remedy."[149] While it cites Justice Scalia's discussion in *City of Arlington*[150] about *Adams Fruit Co. v. Barrett*,[151] it is plain from the excerpt reproduced in Alexandria's comments that Justice Scalia was citing *Adams Fruit* as barring an executive agency from *eliminating* a private right of action in court, and *not* from adopting standards of its own.[152] Properly read, *Adams Fruit* does not prevent the Commission from promulgating "substantive standards" that will then be enforced by the court should a private right of action be brought.[153] The substantive standard at issue here is

---

[147] *See* PCIA at 59; *see also id*. at 50. Thus, a deemed granted remedy would not conflict with procedures established under state law for seeking a writ of mandamus from a court. *See* Springfield, OR at 20. While there should generally be no need for a writ of mandamus in the event the application is deemed granted, an applicant may still resort to state mandamus procedures if a zoning authority refuses to issue needed permits.

[148] *See* NPRM ¶ 141.

[149] Alexandria, VA at 52-53.

[150] 133 S. Ct. 1863, 1871 n.3 (2013).

[151] 494 U.S. 638 (1990).

[152] "In that case, the Department of Labor had interpreted a statute creating a private right of action . . . as providing no remedy where a state workers'-compensation law covered the worker. . . . *Adams Fruit* stands for the modest proposition that the Judiciary, not any executive agency, determines "the scope" —including the available remedies— "of judicial power vested by" statutes establishing private rights of action. *Adams Fruit explicitly affirmed the Department's authority to promulgate the substantive standards enforced through that private right of action*." 133 S. Ct. at 1871 n.3 (emphasis added).

[153] *See id*.

that an application is deemed granted after the expiration of the Shot Clock without appropriate action by the proper reviewing authority.[154]

Much has changed since 2009 when the FCC declined to adopt a deemed granted rule.[155] In 2009, the Commission faced considerable controversy and uncertainty over its ability to adopt a shot clock, that uncertainty has dissipated now that the Supreme Court has upheld the Commission's authority.[156] It is now clear that the FCC is authorized to adopt rules to enforce Section 332(c)(7),[157] and a deemed granted remedy is a logical extension of that authority. Experience has demonstrated the need for a deemed granted approach as part of the Shot Clock to avoid litigation, which can result in years of delay in deploying needed broadband facilities for the benefit of the public. Accordingly, the Commission should move quickly to adopt a deemed granted remedy for the Shot Clock.[158]

IV. COMMENTERS OVERWHELMINGLY AGREE THAT THE TEMPORARY TOWER WAIVER SHOULD BE MADE PERMANENT.

Commenters addressing the issue overwhelmingly agree with PCIA that the FCC should make permanent its waiver exception from the public notice requirements set forth in Section

---

[154] While the deemed grant may obviate the need for applicants to invoke their private right of action by filing a lawsuit, the deemed grant does not affect the applicant's right to bring such a suit—for example, if needed to compel issuance of any necessary permits. If a suit is brought, the substantive standard to be applied by the court will be the deemed grant. The deemed granted rule thus simplifies the substantive level of review by the court, without in any way affecting its jurisdiction or the private right of action.

[155] *See* Alexandria, VA at 52; Colorado Comms. at 26; D.C. at 22; League of CA Cities at 36.

[156] *City of Arlington,* 133 S. Ct. at 1874-75.

[157] *See id.*

[158] To the extent commenters raise constitutional concerns regarding the adoption of a deemed granted rule for the Section 332(c)(7) Shot Clock, *see, e.g.*, Steel in the Air at 10; West Palm Beach, FL at 10-11, those concerns lack merit for the same reasons applicable to the adoption of a deemed granted rule pursuant to Section 6409(a). *See* discussion *supra* Section II.D.

17.4(c)(3)-(4) for temporary towers.[159] These commenters recognize that temporary towers do not have the potential for significant environmental effects, but can ensure the availability of broadband coverage and capacity during major events and other periods of localized high demand. Consistent with the weight of the record, the FCC should recognize these benefits and create a permanent exception for temporary towers.[160]

There is no basis for imposing further restrictions on temporary towers. For example, proposals to decrease the proposed 200-foot height of temporary towers to less than 150 feet or include additional local zoning requirements for temporary towers could complicate the rule and prevent providers from deploying temporary towers effectively.[161] Nor is there any basis to further restrict or complicate the proposed guidelines to prevent speculative abuses.[162] An interim waiver has been in place for temporary towers for more than nine months, and commenters seeking further restrictions provide no evidence of harm that has arisen during this period that would warrant particular enforcement tools or further restrictions.[163]

---

[159] *See, e.g.*, Arkansas Historic Preservation Program at 2; AT&T at 18-20; CTIA at 4-9; Joint Venture: Silicon Valley at 4-5; PCIA at 60-61; Sprint at 6-7; Steel in the Air at 4; TIA at 4; UTC at 9-11; Verizon at 23-25; West Palm Beach, FL at 4.

[160] The record includes a proposal to make one change to the allotted timeframe. Sprint points out that "the timeframe of 60-days or less is not sufficient to include many towers deployed on a temporary basis," such as those used to maintain service after a permanent tower is lost due to fire, storm, or other unforeseen event, and proposes to extend the timeframe to include towers deployed for up to six months. Sprint at 7.

[161] *See* Comments of the City of Mesquite, NV ("Mesquite, NV") at 2 (speculating that a height limit of 120 feet could satisfy the needs of temporary tower deployments); Springfield, OR at 8 (arguing temporary towers should not be permitted to exceed the height of a permanent tower in the same locale).

[162] *See* Comments of Minneapolis, MN at 15; Mendham Borough, NJ at 5; Springfield, OR at 7-9.

[163] While one commenter argues that temporary towers should not be included as part of any environmental notification exemption so that noise, fumes, and vibrations caused by generators may be taken into account, *see* Tempe, AZ at 10, the FCC does not currently examine noise,

(continued on next page)

CONCLUSION

By adopting the measures recommended herein and in PCIA's initial comments, the Commission can take another critical step toward increasing broadband deployment throughout the nation. PCIA and its members stand ready to work with the Commission and interested stakeholders in support of such efforts.

Respectfully submitted,

/s/ Jonathan M. Campbell
Jonathan M. Campbell
Director, Government Affairs

D. Zachary Champ
Government Affairs Counsel

D. Van Fleet Bloys
Government Affairs Counsel

PCIA – The Wireless Infrastructure Association
500 Montgomery Street, Suite 500
Alexandria, VA 22314
(703) 739-0300

March 5, 2014

(footnote continued)
fumes and vibrations as part of its environmental review. *See* 47 C.F.R. §§ 1.1306, 1.1307. Thus, the proposed change will not impact these issues.